Citibank Bhd v Pendaftar Syarikat

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D2-24-2-95
RICHARD TALALLA J
8 JUNE 1995

Companies and Corporations *— Charge — Registration of — Whether an absolute assignment by way of security must be registered — Companies Act 1965 s 108*

The applicant granted a loan to a company. By way of security for the loan the company executed, inter alia, a deed of assignment whereby it assigned absolutely to the applicant all its rights, title and interest in and to the selling price of a number of apartment units in a defined housing project undertaken by it. The applicant's previous solicitors had the view that the deed was not registrable under s 108 of the Companies Act 1965. However, its present solicitors held a view to the contrary. It sought effectively an order pursuant to s 114 of the Act for extension of time in registering the deed. The issue that the court had to first deal with was whether the deed constituted a charge falling within one or more of the categories of charges set out in s 108(3) of the Act and therefore capable of being and must be so registered.

Held, allowing the application:

(1) A charge is created where the parties made it plain by the language they used that it was their intention to create a charge. The deed of assignment was an assignment by way of security.

(2) The deed of assignment was also an assignment by way of charge under s 4(3) of the Civil Law Act 1956.

(3) For the purpose of this case and s 108, the word 'security' was synonymous with the word 'charge'. It would be horrendous if deeds of assignment, albeit absolute, being by way of charge were not registrable under s 108. It was in the public interest that absolute deeds of assignment by way of charge be registered for public notice.

(4) The deed of assignment did constitute a charge as defined by s 108(3)(f).The security thereunder constituted a future book debt solvendum in futuro. Hence the deed was registrable under s 108(1).

[Bahasa Malaysia summary

Pemohon memberikan suatu pinjaman kepada suatu syarikat. Sebagai cagaran kepada pinjaman itu, syarikat itu telah menyempurnakan, antara lain, suratikatan penyerahhakan di mana ia menyerahhak secara mutlak kepada pemohon semua hak-hak, hakmilik dan kepentingan dalam dan kepada harga jualan beberapa unit pangsapuri dalam satu projek perumahan yang telah ditentukan

yang dijalankannya. Peguam pemohon sebelum ini berpendapat bahawa suratikatan itu tidak boleh didaftarkan di bawah s 108 Akta Syarikat 1965. Bagaimanapun, peguamnya sekarang berpendapat sebaliknya. Ia memohon secara efektif satu perintah mengikut s 114 Akta tersebut untuk melanjutkan masa bagi mendaftarkan suratikatan itu. Isu yang pertama yang perlu diputuskan oleh mahkamah ialah sama ada suratikatan itu membentuk gadaian yang termasuk di dalam satu atau lebih daripada kategori gadaian yang dinyatakan dalam s 108(3) Akta tersebut dan oleh itu boleh dan perlu didaftarkan.

Diputuskan, membenarkan permohonan:

(1) Gadaian wujud di mana pihak-pihak menjadikannya jelas dengan bahasa yang digunakan bahawa adalah niat mereka untuk mewujudkan gadaian. Suratikatan penyerahhakan adalah penyerahhakan dengan cara cagaran.

(2) Suratikatan penyerahhakan itu juga adalah satu penyerahhakan dengan cara gadaian di bawah s 4(3) Akta Undang-Undang Sivil 1956.

(3) Untuk tujuan kes ini dan s 108, perkataan 'cagaran' adalah sama dengan perkataan 'gadaian'. Adalah dahsyat jika suratikatan penyerahhakan, walaupun mutlak, melalui cara gadaian tidak boleh didaftarkan di bawah s 108. Adalah untuk kepentingan awam bahawa suratikatan penyerahhakan mutlak dengan cara gadaian didaftarkan untuk pengetahuan umum.

(4) Suratikatan penyerahhakan membentuk satu gadaian seperti yang dimaksudkan oleh s 108(3)(f). Cagaran di bawahnya membentuk hutang masa hadapan solvendum in futuro. Oleh itu suratikatan itu boleh didaftarkan di bawah s 108(1).]

Notes

For cases on charges see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 33-52; [1994] *Mallal's Digest* 548-550; [1995] *Mallal's Digest* 3

Cases referred to

Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149 (distd)

Independent Automatic Sales Ltd v Knowles & Foster [1962] 3 All ER 27 (folld)

National Provincial & Union Bank of England v Charnley [1924] 1 KB 431 (distd)

Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)

United Malayan Banking Corporation Berhad v Aluminex (M) Sdn Bhd (Receivers and Managers Appointed) & Anor. [1993] 2 AMR 3275 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Companies Act 1948 s 95 [England]
Companies Act 1965 ss 108(1), (3), 114
Companies Regulation Sch 2, Form 34

Ahmad Redza bin Abdullah and *Ng Ju Siong* (*Sharizat & Tan*) for the applicant.

Richard Talalla J: In these proceedings the applicant sought effectively an order pursuant to s 114 of the Companies Act 1965 ('the Act') that the time for registration of a charge namely a deed of assignment ('the deed') dated 30 March 1990 be extended for 30 days from the date of the order of this court. The question which arose here was not one of delay or the cause of delay in having a charge registered as required by sub-s 108(1) of the Act as such but whether the deed the subject matter of these proceedings, constituted a charge falling within one or more of the categories of charges set out in sub-s 108(3) of the Act and therefore capable of being and requiring to be so registered, the applicant's previous solicitors who prepared the deed, having been of the view that the deed was not so registrable and the solicitors on record in these proceedings having a view to the contrary. That being the case, a proper course would have been for the applicant to seek a declaration to that effect rather than to proceed in the way it did. However, as there was in the end sufficient material before me to consider the question I accordingly did so.

The applicant had granted a loan of RM56m to a company. By way of security for the loan the company executed, inter alia, the deed whereby it assigned absolutely to the applicant all its rights, title and interest in and to the selling price of 2,400 units of condominium apartments comprising a defined housing project undertaken by the company.

Subsection 108(1) of the Act effectively provides that where a charge to which that section applies is created by a company there shall be lodged with the Registrar of Companies for registration within 30 days after the creation of the charge a statement of the prescribedparticulars, and if that section is not complied with in relation to the charge, the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company. The charges to which that section applies include a charge on book debts of the company and a floating charge on the undertaking or property of the company. See sub-s 108(3)(f) and (g) respectively. Counsel for the applicant submitted that the deed constituted such a book debt or floating charge and therefore its registration as above stated was necessary.

In the case of *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 3 All ER 27, the facts were that the plaintiff company opened an account with the defendants for the purpose of obtaining finance for

their business. The plaintiff signed a letter of hypothecation in favour of the defendants whereby it was agreed that all bills of exchange and other documents etc belonging to the plaintiff company be deposited with the defendants and the proceeds thereof be pledged to the defendants as continuing security for the payment of all liabilities for which the plaintiff company were liable to the defendants. The plaintiff company deposited 53 hire-purchase agreements with the defendants, the outstanding instalments on which amounted to £5,032.88. On 25 July 1960 the plaintiff company went into a creditors' voluntary liquidation. No registration was ever effected under s 95 of the Companies Act 1948, in respect of the letter of hypothecation or the hire-purchase agreements. The plaintiff company claimed that the charge created by the deposit of the hire-purchase agreement was void as against the liquidator of the plaintiff company because of lack of registration. The defendants raised a preliminary point that the plaintiff company could not maintain such an action since s 95 of the English Companies Act 1948 did not make the charge void as against the company, but as against the liquidator or creditors. Section 95 of the Companies Act 1948 provides:

> (1) Subject to the provisions of this Part of this Act, every charge created after the fixed date by a company registered in England and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge together with the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the Registrar of Companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable.
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> (2) This section applies to the following charges: ... (e) a charge on book debts of the company;....

Buckley J held that the charges created by the letter of hypothecation and deposit of the hire-purchase agreements were registrable under s 95(2)(e) of the Companies Act 1948 and not having been registered, were rendered void by s 95(1) of the English Act as against the liquidator of the plaintiff company because the charge created by the deposit of a hire-purchase agreement, being a charge on each of and all the benefits constituted by the agreement was a charge on a debt existing at that time although not due until later, since, on signing the hire-purchase agreement, the hirer comes under a firm obligation to pay at least that amount. At p 35, his Lordship went on to say as follows:

> To this extent he becomes liable as soon as the agreement is binding on the parties for a debt debitum in presenti although in part solvendum in futuro, and to this extent at least the hirer's indebtedness to the company could (and, I think, would) in the ordinary course of a business of this character be entered in well-kept books of the business. If this is right,

> debts under the agreements already existed at the date of the deposit although they were not due to be paid until later. The fact that they were not then immediately payable would not make them any the less debts nor, in my judgment, any the less book debts.

At p 36, his Lordship went on to hold thus:

> ... in my judgment, a charge on future book debts of a company is registrable under s 95. It is not disputed that it is competent for anyone to whom book debts may accrue in the future to create an equitable charge on those book debts which will attach to them as soon as they come into existence (see *Tailby v Official Receiver* (1888) 13 App Cas 523). That such a charge can accurately be described as a charge on book debts does not appear to me to be open to question. Such a charge would not, of course, be effective until a book debt came into existence on which it could operate. Nevertheless, I think that it would be accurate to speak of the charge being created at the date of the instrument, deposit or other act giving rise to it, for no further action on the part of the grantor would be required to bring the charge to life. A charge on book debts, present and future, is a not unusual form of security in the commercial world, and it would seem to me strange if such a charge were registrable (as it undoubtedly is) and a charge confined to future book debts were not. I find nothing in the language of s 95 requiring me to read sub (2)(e) in so restricted a way as to confine it to a charge on existing book debts.

The provisions of s 108(1), (2) and (3)(f) being similar in substance to that of s 95 set out above, I respectfully adopt the decision in the above case. It has to follow that the selling price in the instant case constitutes a book debt, in some or all instances a future book debt, but nonetheless a charge as provided by sub-s 108(3)(f) and hence the Deed is registrable under sub-s 108(1).

The view of the previous solicitors was that the deed being an absolute assignment, by reference to s 4(3) of the Civil Law Act 1956, and the Supreme Court case of *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 was not a charge as defined by s 108 and therefore was not registrable thereunder. Section 4(3) abovesaid reads as follows:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

In the *Hipparion* case, the facts were that the plaintiff, a licensed bank, entered into an agreement ('the loan agreement') with the defendant, whereby the plaintiff granted a loan ('the loan') to the defendant, repayable with interest. By way of security for the loan, the defendant executed a deed of assignment whereby it assigned absolutely to the

A plaintiff all its rights, title and interest in certain immovable property ('the property') and in respect of a sale agreement whereby the defendant had bought the property from a company in Penang. It was further provided in the loan agreement that the defendant would remain in possession of the property only as contractual licensee of the plaintiff and that within seven days after its licence to occupy the property had B been terminated, it would have to give immediate vacant possession thereof to the plaintiff, and thereafter the plaintiff would have the right to enter upon the property and to deal with all its rights, title and interest in the property. The defendant defaulted in making payments due under the loan agreement, in consequence whereof the plaintiff, C after issuing notices of demand, commenced proceedings in the High Court in Penang, for inter alia, an order that it be at liberty to sell the property by public auction or private treaty and that the defendant do quit and deliver up possession of the property within seven days of the court order. Gunn Chit Tuan SCJ (as he then was), at p 151, reiterated what the Federal Court said in *Nouvau Mont Dor (M) Sdn Bhd v Faber* D *Development Sdn Bhd* [1984] 2 MLJ 268 and quoted by reference to the headnote thereof as follows:

> ... Whether or not an assignment is an absolute one (not purporting to be one by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself ...

E He went on to say as follows:

> ... Looking at the document we agreed with the conclusion of the learned judge that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The deed clearly purports, and is intended in point of form to be F an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given 'by way of charge' is not one which absolutely transfers the property.

G In the textbook on *Law of Mortgages* (9th Ed) by Fisher and Lightwood, it was stated that no particular form of words is necessary for the purpose of creating a charge. Any written instrument showing the intention of the parties that a security should be thereby created would suffice although it contains no general words of a charge. The authors further defined a charge at p 156 as follows:

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> A charge is a security whereby real or personal property is appropriated for the discharge of a debt or other obligation but which does not pass either an absolute or a special property in the subject of the security to the creditor, nor any right to possession, but only a right of realization by judicial process in case of non-payment of the debt.

I In the case of *National Provincial & Union Bank of England v Charnley* [1924] 1 KB 431 where it was held that it is enough that the parties made it plain by the language they used that it was their intention to create a charge, Scrutton LJ said at p 445:

> I am not going to attempt an exhaustive definition of an equitable charge, but I think that the substance of an equitable charge is this: if an agreement be made to grant some interest in existing or future property for the purpose of securing the payment of a debt, that agreement to give the security confers an equitable security or charge, though all the formalities necessary to create the actual security have not been complied with.

Atkin LJ, in the same case, stated the following at pp 449–450:

> It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right ... to possession, but only gets a right to have the security made available by an order of the court. If those conditions exist, I think there is a charge.

As I see it, the deed comes well within the said definitions enunciated in the said textbook and the two dicta last referred to. Indeed the deed of assignment is as much a security as each of the principal documents was found to be in the Supreme Court and Federal Court cases above stated. In truth in each of those cases the respective courts specifically found the transaction concerned to be an absolute assignment by way of security albeit not by way of security only.

However, the cases last referred to concerned rights of the parties to the absolute assignment or their successors. The said cases had nothing to do with the provisions of s 108.

To my mind s 108 provides against a mischief, the mischief being that members of the public seeking to transact business with a company having no knowledge of the assets of the company being subject to charge. I see the deed in this case, notwithstanding that it is an absolute assignment, as an assignment by way of security as was found in the two cases last referred to, and by way of charge under s 4(3) of the Civil Law Act 1956, albeit not by way of charge only, and by such reasoning it has to follow for the purpose of this case and s 108, the word 'security' is synonymous with the word 'charge'.

To my mind it would be horrendous if deeds of assignment, albeit absolute, being by way of charge were not registrable under s 108. The public dealing with a company would be dangerously affected and the responsible executive authority should in those circumstances be duty bound to legislate for registration for public notice of absolute deeds of assignment by way of charge. My view is that the courts should lean in favour of public protection and therefore the application of s 108 rather than against the same. As I see it, in this instance the executive authority need not to be troubled nor does the court need to overstretch itself in applying the provisions of s 108 to the present case. It is clear to me for the above reasons that s 108 does so apply.

It should be stated that in the Supreme Court case of *United Malayan Banking Corp Bhd v Aluminex (M) Sdn Bhd (Receivers and*

Managers Appointed) & Anor [1993] 2 AMR 3275, a major feature in the subject matter under consideration was a document described as a loan agreement cum assignment which was registered as a charge pursuant to s 108 of the Act. It was indisputably an absolute assignment within the meaning of s 4(3) of the Civil Law Act 1956. See the judgment of the Court delivered by Edgar Joseph Jr SCJ at p 3288 and 3289. There was a priority issue involving a prior chargee (see p 3296) whose debentures had been registered under s 108 (see p 3287) and the assignee under the absolute assignment. His lordship at p 3300 and 3301 in giving consideration to that issue referred to the procedure then in force for the registration of a debenture and particulars required to be entered under the Act by reference to the Companies Regulations 1966, Sch 2, Form 34 prior to its amendment. There was no suggestion from any quarter that the absolute assignment should not or need not have been so registered.

I find that the deed does constitute a charge as defined by s 108(3)(f). I find that the security thereunder constitutes a book debt, albeit a future book debt solvendum in futuro as defined by Buckley J in *Independent Automatic Sales Ltd v Knowles & Foster* above-stated.

I find that the delay in registering the deed under s 108 was caused by the solicitors concerned being uncertain as to whether the security was so registrable or not. I find that uncertainty to have been a reasonable one and it has to follow that the delay in registration is reasonable.

Accordingly I order that the period specified for the filing of Form 34 under s 110 of the Companies Act 1965 constituting the registration of the Deed be extended for 30 days from the date of this order.

Application allowed.

Reported by Simon CK Chui